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April 21, 1994

RECEIVED

APR 21 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

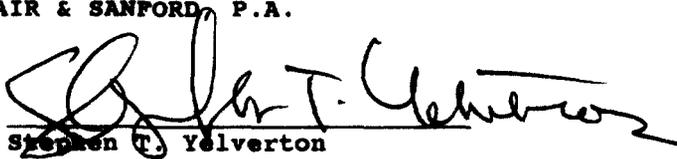
Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Opposition to Petition for Leave to Amend of WII."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


Stephen T. Yelverton

Enclosure

B:CATON.136

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OPPOSITION TO PETITION FOR LEAVE TO AMEND OF WII

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this opposition to petition for leave to amend. On April 13, 1994, Wilburn Industries, Inc. ("WII") filed a "Petition for Leave to Amend" and related amendment.

ORA requests leave to file this opposition. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying and non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because WII's amendment raises certain basic qualifying and non-integration matters, a response is appropriate. In support of its opposition, ORA offers the following comments.

In its petition for leave to amend, WII seeks to amend its application to report that its proposed tower site has been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. WII further represents that it has received "reasonable assurance" of the availability of another tower site and will file an appropriate technical amendment specifying the new site.

ORA opposes acceptance of the amendment until WII supplies additional information about the sale of its former proposed tower site. WII fails to disclose when the tower site was sold. Although WII attached a copy of a letter, dated March 2, 1994, from Mid-Ohio, indicating that the tower site had been sold, the letter does not state when the site was sold. Moreover, WII fails to state whether it became aware that the tower site had been sold prior to receipt of the March 2, 1994, letter from Mid-Ohio.

Such information is necessary to determine whether WII timely reported the loss of its tower site within thirty (30) days, pursuant to Section 1.65, and also whether it has acted with "due diligence" in obtaining "reasonable assurance" for the new tower site. See, National Communications Industries, 6 FCC Rcd 1978, para. 4 (Rev. Bd. 1991); Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5753, n. 9 (1990); Brownfield Broadcasting Corp., 88 FCC2d 1054, 1058 (1982).

Even if WII first became aware of the sale of its former proposed tower site on March 7, 1994 (the date it claims that it received the March 2, 1994,

letter from Mid-Ohio), a Section 1.65 reporting issue would nevertheless be raised. WII's April 13, 1994, amendment was filed more than thirty (30) days later. It offered no explanation for this delay and lack of diligence.

Under established Commission precedent, a post-designation amendment can not be accepted if acceptance would require the specification of new issues and require additional hearings. See, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970). WII has simply failed to provide sufficient information about the sale of its former proposed tower site.

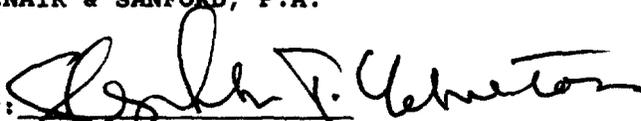
The amendment of WII must not be accepted on another basis. The March 2, 1994, letter submitted with the amendment indicates that WII never had "reasonable assurance" from Mid-Ohio of its former proposed tower site. The letter states in pertinent part that Mid-Ohio had only been "willing to negotiate" with WII a "possible" lease of the tower site. However, a mere possibility that a site will be available is not sufficient. William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); National Communications Industries, para. 9. More than a vague "willingness to deal" is needed to constitute "reasonable assurance." Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988). See also, ORA's exceptions, paras. 82-84, filed December 20, 1993.

It is axiomatic that an applicant must have "reasonable assurance" of the availability of its proposed tower site at the time of initially filing its application. Rem Malloy, 6 FCC Rcd 5843, 5846, para. 15 (Rev. Bd. 1991); Adlai E. Stevenson IV, 5 FCC Rcd 1588, 1589, para. 7 (Rev. Bd. 1990); Radio Delaware Inc., 4 FCC Rcd 8630, 8631, para. 9 (Rev. Bd. 1989). Accordingly, unless WII demonstrates that it had "reasonable assurance" of its former proposed tower site at the time of initially filing its application, a new tower site can not be approved.

WHEREFORE, in view of the foregoing, the Review Board is requested to not accept the amendment of WII, nor approve its new proposed tower site.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

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April 21, 1994

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DAVID M. BUDA

March 2, 1994

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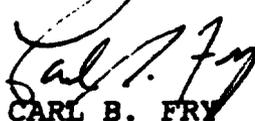
RE: Mid-Ohio Communications, Inc. / WBBY-FM / Lease of Assets

Dear Mr. Wilburn:

This correspondence is to advise you that all of the real estate and personal property owned by Mid-Ohio Communications, Inc. or affiliated companies which was utilized in regard to the broadcast operation of WBBY-FM has been sold to Spirit Communications, Inc. As you are aware, it has been over two years since the previous owner advised you that if you were awarded the construction permit for the frequency that the previous owner would be willing to negotiate with you regarding the possible lease of the real estate and/or personal property previously involved with the operation of the station. The previous owner has never been advised by you or anyone that a new constructive permit has been issued in regard to the frequency, and the real estate and personal property has now been sold. I am unaware of the new owner's intent in regard to the real estate or the personal property and if you wish to discuss the matter with the new owner, please contact Mr. John Shumate, Spirit Communications, Inc., 114 Dorchester Square, Westerville, Ohio 43081.

Since the real estate and personal property are no longer available for lease by Mid-Ohio Communications, Inc., or affiliated companies, you need to make appropriate arrangements as you deem necessary or as may be legally required in regard to your Application filed with the FCC. If you have any questions regarding this correspondence, please feel free to contact me.

Sincerely,



CARL B. FRY

/lt

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 21st day of April, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Opposition to Petition for Leave to Amend of WII" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
Room 211
2000 L Street, N.W.
Washington, D.C. 20554

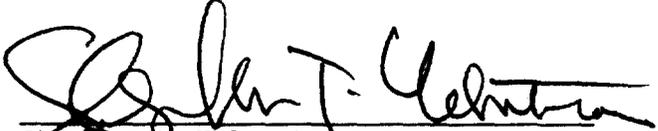
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Stephen T. Yelverton

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